United Nations AT/DEC/1147

Administrative Tribunal

Distr.: Limited
30 January 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1147

Case No. 1246: AGUADO BOMBIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 26 February 2002, Rosa Aguado Bombín, a staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

"*Section II: Pleas*

1. That the [T]ribunal determine that the Secretary-General did have discretion to place the Applicant in a higher step than that specified in ... [staff rule] 103.9(a).

2. That the [T]ribunal determine that under the circumstances of the present case, the Secretary-General should have placed the Applicant in the highest step of the P-3 level.

3. That the Tribunal [award] US $1,000 in costs."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002;

Whereas the Respondent filed his Answer on 17 June 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Office at Vienna (UNOV), Division on Narcotic Drugs, on a three-month project personnel appointment as a Scientific

Expert, at the L-3, step VI level, on 1 May 1988. Her appointment was extended numerous times until 31 August 1995, when the project post she had been placed against was discontinued. On 1 September 1995, the Applicant was granted a four-month fixed-term appointment, against a regular budget post, at the P-2, step XII level, which appointment was extended several times. On 10 April 1996, the Applicant successfully applied to the P-2 post she was encumbering, and, effective 1 September 1996, was granted a two-year fixed-term appointment, which was subsequently extended by a further period of three years. On 1 December 2000, the Applicant was promoted to the P-3 level. She was granted step VI.

On 11 December 2000, the Applicant wrote to the Director, Division of Administrative and Common Services, UNOV, requesting a review of the step granted to her upon her promotion and, on 3 January 2001, she was informed that the step she was granted "was determined accurately in line with the applicable rules and regulations".

On 22 January 2001, the Applicant requested the Secretary-General to review the administrative decision to appoint her to a P-3 level post at step VI and, on 25 March, the Applicant was informed that the original decision would be maintained.

On 25 April 2001, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 27 September 2001. Its findings and conclusion read, in part, as follows:

> "**Findings**
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> ...
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> 12. While the Panel is certainly sympathetic of the circumstances that the Appellant has had to face in her [United Nations] career, it is, however, of the opinion that where the Respondent had discretion, it was generally exercised to minimize negative impact on the Appellant. When the Appellant's project post was discontinued, for example, the Respondent offered to the Appellant, exceptionally, a more stable, regular budget post ... When the Appellant was placed against the P-2 post, the Respondent used [his] discretion to place her at step XII to minimize financial losses she would incur incident to her having to relinquish a salary at the L-3 level. After clearing the relevant Appointment and Promotion bodies, the Appellant was given a two-year fixed-term appointment, which was extended for a period of three years in September 1998 (the longest extension she had received under the 200 series of the Staff Rules was for one year).
>
> 13. While there are indications that the Respondent could have handled the employment of the Appellant more transparently ... the Panel notes that the Appellant agreed of her own free will in September 1995 to accept the

offer of appointment to the P-2 regular budget post, and to be bound by the provisions of the 100 series of the Staff Rules. The Panel therefore has difficulty concluding that the Respondent's determination of the Appellant's position on the salary scale as step VI of the P-3 level is an abuse of discretion.

Conclusion

14. For the reasons cited above, the Panel rejects the claim of the Appellant to adjust the step granted upon her promotion from the P-2 level to the P-3 level."

On 13 December 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's conclusion and had decided to take no further action on her appeal.

On 26 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Secretary-General had discretion in implementing staff rule 109.3(a). The JAB erred in deciding to the contrary.

2. Although the Secretary-General has no discretion to assign a staff member on promotion to a lower step than that provided for by staff rule 103.9(a), it cannot be true that he has no discretion to make favourable assignment in an appropriate case.

3. In view of the Applicant's employment history, it would have been entirely appropriate to assign her to a higher step.

Whereas the Respondent's principal contentions are:

1. The Applicant was placed at the correct step upon her promotion.

2. The Applicant did not have a legal expectancy of a higher step upon promotion.

The Tribunal, having deliberated from 30 October to 17 November 2003, now pronounces the following Judgement:

I. This Application arises out of a decision by the Respondent to promote the Applicant from the P-2, step XII level to the P-3, step VI level. Although the Applicant does not dispute the promotion itself, she asserts that the granting of a step

VI was improper, because, after thirteen years of service with the United Nations she was "at precisely the same level and step she was first appointed".

II. The Applicant began her employment with the United Nations as a Scientific Expert in the United Nations Division on Narcotic Drugs in Vienna, on 1 May 1988 at the L-3, step VI level. Initially, she received a short-term project appointment under the 200 series of the Staff Regulations and Rules, which was subsequently extended numerous times on various fixed-term appointments, until 31 August 1995, when the project post against which she had been placed was discontinued.

When the Applicant's project post was discontinued, the Respondent offered to the Applicant, on an exceptional basis, a more stable, regular budget post, generally earmarked for successful candidates of the national competitive examinations, in order to prevent the Applicant from having to separate from the Organization. Thus, on 1 September 1995, the Applicant was placed on a four-month, fixed-term appointment under the 100 series of the Staff Regulations and Rules, at the P-2 step XII level. (At the time of her appointment to the P-2 post, the Respondent had the authority to make such discretionary appointments. Such authority no longer exists.) The Respondent also exercised his discretion in the appointment process by placing her at the highest step in the level, step XII, in an effort to minimize the financial loss the Applicant had suffered as a result of the discontinuation of her project appointment at the L-3 level. Thereafter, upon consideration by the relevant appointment and promotion bodies, the Applicant was given a two-year fixed-term appointment, which was extended for a period of three years in September 1988. The longest extension the Applicant had received under the 200 series post she held was a one year extension.

On 1 December 2000, the Applicant was promoted from the P-2 step XII level to the P-3 step VI level.

III. The Applicant challenges the decision to place her at step VI of the P-3 level, asserting that, while "the Secretary-General has no discretion to assign a staff member on promotion to a lower step than that provided for by staff rule 103.9 (a), it cannot be true that he has no discretion to make a favourable assignment in an appropriate case." She asks the Tribunal to determine that the Secretary-General did have such discretion and that, under the circumstances, the Secretary-General should have placed the Applicant in the highest step of the P-3 level.

IV. The Applicant's characterization of the issue, however, is improper. The issue at hand is not whether the Secretary-General had discretion to place her at a higher step, but, rather, whether the Applicant received the appropriate step increase to which she was entitled.

Staff rule 103.9 (a) provides:

> "(a) On promotion, a staff member *shall* be placed at the lowest step in the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level." (Emphasis added.)

Barring any extraneous factors or considerations, such as, for example, a promise or commitment made to the Applicant that a higher step would be forthcoming, the Applicant has no basis to claim entitlement to a step higher than step VI. The language of rule 103.9 (a) is mandatory, not optional – a staff member "shall" be placed; it does not say "may" or "at a minimum, shall". Contrary to the discretion the Respondent had to place the Applicant against a regular budget post, the Respondent did not have such discretion with respect to promotions. Thus, when the Respondent placed the Applicant at step VI of the P-3 level, following her promotion from her P-2 step XII level, he was following exactly the mandate of staff rule 103.9 (a).

V. The Applicant's reliance on staff rule 104.3 (a), as asserted in her claim before the JAB, is also misplaced. Staff rule 104.3 (a) applies to the re-employment of staff, and is not intended to govern promotions.

VI. Finally, the Applicant has failed to provide any evidence, such as a promise or commitment to place her at a higher step, or any other extenuating circumstances that might warrant a deviation from the plain meaning of the language of staff rule 103.9 (a). While she makes some reference to the fact that, initially, she was offered orally a position at the L-4 level, and that the actual job offer she received in writing was at the L-3 level, this is irrelevant to the issue at hand. At the time, whether or not the Applicant objected, she knowingly accepted the L-3 appointment. Similarly, she accepted the P-2 appointment offered to her in 1995, and then again the promotion granted to her in 2000, knowing full well the salary ramifications. Indeed, while it is unfortunate that the Applicant's salary level is at the same level at which she started when she first joined the United Nations, the Tribunal notes that

her position is significantly improved from that time, as she is now no longer a project personnel, subject to the terms of a particular project or projects, which by their nature generally are of a more temporary basis, but instead holds a regular, budgeted post, that provides her with all the benefits attendant thereto.

VII. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1148

Administrative Tribunal

Distr.: Limited
30 January 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1148

Case No. 1249: MALEH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Brigitte Stern;

Whereas, on 8 February 2002 Ayman Maleh, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

> "II: ***Pleas***
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> ...
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> The Applicant requests full compensation for the duration of the project. He is requesting the repatriation grant and compensation for the injury to his professional reputation ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 July 2002 and once thereafter until 31 October 2002;

Whereas the Respondent filed his Answer on 31 October 2002;

Whereas, on 23 January 2003, the Applicant filed Written Observations amending his pleas as follows:

> " ... the Applicant requests the Tribunal to find in his favour and to grant him the appropriate compensation to which he is entitled of three years net base pay, in light of the exceptional circumstances of the case."

Whereas the facts in the case are as follows:

On 30 July 1995, the Applicant accepted an offer of a one-year intermediate-term Project Personnel Appointment (200 series), as a Civil Engineer (Materials) at the L-4 level, with the Department for Development Support and Management Services (DDSMS). The Applicant was assigned to a highway and transport development project in Riyadh, Saudi Arabia, with 30 October 1995 his effective date of entry on duty.

On 29 October 1995, the Resident Co-ordinator in Riyadh informed Natural Resources & Environment Planning and Management Branch (NREPMB) that the Saudi Ministry of Communications did not wish to recruit the Applicant as an international expert, but rather as a United Nations Volunteer (UNV). He further stated that there seemed to be much confusion regarding the post against which the Applicant was to be recruited and that, unfortunately, he was only made aware of this problem the previous afternoon. He added that the Applicant should be informed "urgently *prior to his departure*, that he should *postpone his arrival* in Saudi Arabia *until further notice*". On 30 October, DDSMS unsuccessfully attempted to contact the Applicant in this regard.

On 31 October 1995, DDSMS wrote to the Resident Co-ordinator in Riyadh, reminding him that, on 17 June 1995, DDSMS was officially informed of the Applicant's selection by the Saudi Ministry of Communications, following which, in July, the Applicant's contract with the United Nations was established; the Resident Co-ordinator was also informed that the Applicant was on his way to Riyadh.

On 1 November 1995, the Applicant arrived in Riyadh and was informed by the Resident Co-ordinator that there had been a "misunderstanding" between the Organization and the Saudi Authorities and that the Saudi Government had not approved the appointment of an international expert. On 6 November, the Resident Co-ordinator wrote to the Officer-in-Charge (OiC), NREPMB, updating on the events concerning the Applicant's case and requesting, inter alia, a "conditional authorization" to provide the Applicant with a one-way ticket to New York.

On 5 December 1995, a letter of appointment was prepared, indicating that the Applicant's appointment was for one year, at the L-4 level, effective 30 October 1995, for service with the Highway and Transport Development, Management and Maintenance in Riyadh, Saudi Arabia.

On 20 December 1995, the OIC, NREPMB, informed DDSMS that the Saudi Government had confirmed that the Applicant's post was no longer needed and that

NREPMB concurred with this position. He requested assistance with cancellation of the Applicant's contract and earliest repatriation and added that, at present, there were no alternative positions available for an expert with the Applicant's expertise. On the same day, the Applicant was informed that DDSMS and the Saudi Government had agreed to repatriate him immediately to New York and that he should contact DDSMS after the Christmas holiday. Subsequently, the Applicant returned to New York.

On 2 February 1996, the Applicant was informed that, since the Saudi Authorities had confirmed their request that his post be cancelled, his appointment would be terminated. On 17 March, the Applicant indicated that he was "able and willing to accept any transfer under the terms of the contract" which he had been holding.

On 24 April 1996, the Assistant Secretary-General, Office for Human Resources Management (OHRM), informed the Applicant that the Secretary-General had decided to terminate his appointment effective 30 April 1996. He indicated that his letter constituted a "formal notice of termination of [the Applicant's] appointment in accordance with Staff Rule 209.4 (a)" and that "the Secretary-General has decided to grant you termination indemnity equivalent to one week salary for each month of uncompleted service through 29 October 1996", as well as one-month's salary in lieu of notice.

On 8 May 1996, the Applicant requested the Assistant Secretary-General, OHRM, to reconsider the decision to terminate his contract, and further requested that he be assigned to another post, at least until the expiration date of his contract. He indicated that he had "abandoned so much in order to respond to an invitation from the [United Nations] to accept employment that carried with it, he was assured, excellent prospects of extension".

On 11 August 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 30 October 2001. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Consideration***
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> ...
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> 26. The Panel observed that ... the decision to terminate the Appellant's appointment was taken in conformity with the Staff Rule 209.2 (d) inasmuch as the post to which he had been appointed was abolished, and the Respondent could not find another post suitable for his specialised qualifications. In the Panel's view, the Saudi Government's objection to the Appellant's appointment had created such a crippling effect on the Respondent's ability to honour the Appellant's contract, as to constitute a

reasonable ground for the termination of his appointment. The Panel nevertheless ... observed that there had been mishandling of the Appellant's appointment ...

...

30. ... the Panel found that the Administration mishandled the Appellant's case in a number of ways, aborting the contract term, bringing the Appellant to the duty station in spite of the by then known government objections to his appointment, issuing a one-year letter of appointment months after it became clear that the Appellant would not perform the functions for which he was to be recruited and in taking an additional four months to terminate his appointment. The Panel also noted with dismay the length of time (5 years) allowed to elapse in an effort at conciliation.

31. The Panel believed that the Administration had shown a lack of good faith in the handling of the Appellant's case, and had taken too long to resolve the uncertainties surrounding the Appellant's appointment.

Conclusions and Recommendations

32. ... the Panel concluded that the decision to separate the Appellant from service for abolition of post was taken in accordance with the Staff Rules and Regulations. The Panel found that the Respondent mishandled the Appellant's case in ways that resulted in tangible injury to the Appellant. The Panel therefore unanimously recommended that the Appellant be paid as compensation a sum equivalent to six months of his net base salary, (representing the balance of his contract) minus any termination indemnity he may have received."

On 9 January 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General observes that the termination of your appointment resulted from reasons beyond the Organization's control and, accordingly, does not agree with the finding that the Administration mishandled your case because the contract term was aborted. Similarly, it is not clear on what basis the Board found that the Administration mishandled your case when it brought you to the duty station, as the record indicates that you were already on your way to Saudi Arabia when DDSMS was first informed of the uncertainties surrounding your appointment. Furthermore, the fact that it took four months to terminate your appointment did not result in material injury to you, as you continued being paid a salary during those four months. However, the Secretary-General acknowledges the uncertainty that you may have experienced during that time, and he also accepts the Board's finding concerning the belated issuance of the letter of appointment. He has therefore decided to compensate you in the amount of three months net base salary at the rate in effect at the time of your separation from service, minus the termination indemnity that you have received. ..."

On 8 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent is in breach of his contract with the Applicant.

2. The Resident Co-ordinator knew or should have known of the problem and should have notified Headquarters long before the Applicant's retention in service and departure for Saudi Arabia; it remains unexplained how he could have instructed DDSMS to proceed with the recruitment of an international expert without having secured the Saudi Government's approval of the post, if that was a requirement.

3. The Applicant gave up a career position based on the Respondent's offer, which although was initially for one year, its terms as reflected in the job description and confirmed in the recruitment interviews, indicated an expected duration of the project for four years.

4. The Applicant was kept in service until 30 April 1996, which although portrayed as a benefit to him, actually prevented him from making alternative plans while in a state of uncertainty over his future.

5. The JAB unduly delayed the Applicant's appeal for over five years.

Whereas the Respondent's principal contentions are:

1. The Applicant's termination constitutes a proper exercise of the Respondent's authority. The early termination of the Applicant's appointment did not violate the Staff Regulations and Rules.

2. The Administration learned that the Applicant's post was "abolished" by the Saudi Authorities *after* the Applicant left for Saudi Arabia.

3. The Applicant suffered no tangible injury because he was paid during the delay in termination.

4. The Administration offered the Applicant sufficient compensation for the uncertainty he may have experienced and the belated issuance of the letter of appointment.

5. The Applicant has offered no legal basis for compensation for the duration of the project. The Applicant has not offered any evidence of alleged injury to his professional reputation, thus there is no basis for compensation for such injury.

6. The Applicant is not entitled to a repatriation grant under the applicable rules.

The Tribunal, having deliberated from 27 October to 17 November 2003, now pronounces the following Judgement:

I. The Tribunal is satisfied that the Applicant suffered a very upsetting and deeply frustrating experience as a consequence of the events which gave rise to these proceedings.

II. In July 1995, the Applicant was recruited by the Organization to serve on an intermediate term (200 series) contract as a Civil Engineer/Materials in Saudi Arabia for a period of one year, to commence on 30 October 1995.

The Applicant departed from the United States on 30 October 1995, having made extensive arrangements and commitments and having resigned from a position he held with an engineering consultancy firm in New York, on the basis that he would be working in Saudi Arabia for a minimum of the next twelve months, with verbal indications of good prospects for a four year assignment. On his arrival in Riyadh on 1 November, he reported for work, only to be informed that he could not take up duty because of a 'misunderstanding' which had arisen between the Saudi Arabian Authorities and the Organization. It appears from the record that the problem had arisen as a result of a disagreement between the Saudi Arabian Ministries of Foreign Affairs and of Communications as to the status upon which the Applicant was to be retained: whilst there was a willingness to accept him as a United Nations volunteer, the Saudi Arabian Authorities were not willing to have him as an international expert, being the status upon which he had been recruited by the Organization. The record also indicates that the Saudi Arabian Authorities had not communicated to the Organization their objection until shortly before the Applicant was to depart from his home in the USA to travel to Riyadh, making it difficult to contact him in a timely manner so as to inform him of the difficulties and to postpone his journey. It appears that attempts had been made to contact the Applicant at his home and through his wife at her office but that they were unsuccessful.

III. The Applicant has submitted and the JAB has found that the Organization mishandled his case in a number of ways, including the proposition that he had been brought out to Saudi Arabia in spite of the then known Saudi Arabian objection to his appointment. The Tribunal can find no evidence to support this finding. The evidence indicates to the contrary. Whilst the record shows that similar problems had arisen in the past and that other candidates had been rejected on like grounds, it seems

clear that the objection of the Saudi Arabian Authorities or the differences in their belief as to the status on which the Applicant had been recruited, were not made known to the Organization until it was too late to contact the Applicant before his departure, despite efforts made to do so.

Whilst it may well be that the Organization should have acted with greater care, so as to have confirmed in advance that there was no problem or misunderstanding regarding the Applicant's status and acceptability, this is a very different criticism than the one found by the JAB, which was that the Organization had actively brought the Applicant out to Riyadh despite having actual knowledge as to the problem.

IV. Between 1 November, when the Applicant arrived in Riyadh and 24 December 1995, when he was repatriated to the USA, various inquiries and approaches were made by the Organization to the Saudi Arabian Authorities to see if the issue might be resolved or if some other solution could be agreed. This culminated with an offer made to the Applicant to take up work with the status of a volunteer and a later offer, to work as a national professional, rather than as an international expert. Each offer was clearly far less advantageous to the Applicant, as it would have carried a considerable reduction in remuneration and he would not have had the status or privileges of a staff member. The Applicant acted within his rights in declining to accept these offers and in the circumstances, when no suitable way could be found to retain the Applicant in Saudi Arabia in conditions acceptable to him, he was duly repatriated.

V. In early February 1996, the Applicant was informed that the Saudi Arabian Authorities had confirmed their request that the post for which he had been recruited be cancelled. It appears that by this time, the project for which the Applicant was recruited had either been cancelled or postponed.

The Applicant was accordingly advised that the Organization was in the circumstances "compelled to proceed with an arrangement for the termination of his appointment". The Applicant argues that what in effect took place was an unwarranted interference by the Saudi Arabian Authorities in the affairs of the Organization, such as is prohibited by Article 100 of the Charter, which prevents the Organization from seeking or receiving instructions from any Government or from any other authority external to the Organization. The Tribunal rejects this submission. The Tribunal accepts the JAB's findings that "the Saudi Government's objection to

the [Applicant's] appointment had created such a crippling effect on the Respondent's ability to honour the [Applicant's] appointment as to constitute a reasonable ground for the termination of his appointment". In the circumstances, the Tribunal shares the JAB's conclusion that the Applicant's appointment was terminated in conformity with staff rule 209.2(d) in so much as the post to which he had been appointed was abolished and the Respondent could not find another post suitable for the Applicant's specialised qualifications.

On 24 April 1996, the Applicant was formally notified that the Respondent had decided to terminate his appointment effective 30 April 1996, and that this notification constituted formal notice of termination of his appointment in "accordance with staff rule 209.4(a)". The Applicant was also informed that he would be granted termination indemnity equivalent to one week's salary for each month of uncompleted service through 29 October 1996, in accordance with Annex III (b) of the Staff Regulations, and one month's salary in lieu of notice, in accordance with staff rule 209.4(b).

VI. In due course the Applicant submitted an appeal to the JAB, contesting the decision to terminate his contract. The Presiding Officer of the JAB decided that it was appropriate to refer the matter for conciliation in accordance with staff rule 111.2(b). This attempted conciliation was unsuccessful but caused a five-year delay in the resumption of the hearing of the Applicant's appeal before the JAB. The Applicant maintains that all that occurred during the five-year period was the holding of two fruitless and futile meetings, during which the Respondent's representatives insisted that they were not authorised to negotiate. Whether or why, it appears that this delay was again wholly unjustified and the conciliation process ought to have ascertained, within a reasonable time, if there were real prospects of a negotiated settlement, and in the absence of such prospects, the process should have been concluded without more ado.

VI. The JAB made additional findings that there had been mishandling of the Applicant's appointment and ultimate separation for reasons which it specified in its report. It concluded that the Administration had shown a lack of good faith in the handling of the Applicant's case and that it had taken too long to resolve the uncertainties surrounding the Applicant's appointment. Save for the JAB's finding that the Organization had brought the Applicant out to Saudi Arabia after it had known the Saudi Arabian Authorities' objection to his appointment, the Tribunal

considers that, based on the facts, the JAB was entitled to reach its other conclusions. Since there was sufficient evidence to justify these conclusions, the Tribunal is bound by them for the reasons stated in Judgement No. 1009, *Makil* (2001):

> "... the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently."

VII. In light of its findings, the JAB had recommended payment to the Applicant of six months net base salary (minus the termination indemnity which had been paid) as compensation for the matters of which he had complained which had been upheld in its proceedings. The Tribunal finds that this does not amount to appropriate compensation commensurate with the Applicant's injury, even having rejected the JAB's finding that the Applicant had been brought to Saudi Arabia after the Organization knew of the Saudi Arabian objection to his appointment.

The Applicant cites Judgement No. 767, *Nawabi* (1996) as relevant to his case. The Tribunal notes that the present case is dissimilar to *Nawabi* on a number of determining issues. In *Nawabi*, the Respondent requested the Applicant's employer to expedite his release despite knowing that the post which the Applicant was to encumber was being abolished; the Applicant's family had already joined him in Damascus; and other mishandling of the Applicant by the Organization took place. In the present case, the Applicant departed for Riyadh shortly after the Saudi Arabian objection to his employment became known, making it extremely difficult to notify him of this prior to his departure and, his family had not yet departed the USA.

Having differentiated between the two cases, the Tribunal is nevertheless convinced that the compensation awarded to the Applicant should be increased to better compensate for the injuries he sustained. In particular, the Tribunal considered the fact that the Applicant left a position to take up employment with the United Nations, based on a one-year contract and verbal indications of good prospects for a four year assignment.

The Tribunal also considers that the Respondent should have taken better care to ensure the Saudi Arabian Authorities' agreement to the recruitment of the Applicant, especially since difficulties regarding this issue had been previously encountered. Had proper and timely care been given to this issue, there should have been ample time to inform the Applicant of the situation and to avoid his unnecessary travel to Riyadh. The Tribunal considers that the Respondent was negligent in this regard.

In this context, the Tribunal wishes to point out, as did the JAB in *Nawabi*, that

> "[a]ny potential recruit to the United Nations hearing the facts of this case would indeed be foolish to accept a fixed-term appointment with the Organization. If steps are not taken to rectify such situations - instead of attempting to defend and justify them, the United Nations may one day find that it can no longer recruit and retain competent professionals."

VIII. In determining the amount of compensation, the Tribunal also considered the exceptionally long delay in adjudicating the Applicant's case before the JAB. Whilst the Tribunal commends attempts at conciliation, there could be no doubt that these should have been completed, one way or the other, much earlier. The Tribunal takes this opportunity to reiterate its position, as recently stated in Judgement No. 1067, *Ou* (2002):

> "... the Tribunal commends the efforts made to reach an agreed resolution of this dispute by way of conciliation. It is the Tribunal's view that the notion of conciliation between the parties is to be encouraged. However, any conciliation process has to be negotiated and carried out in good faith."

IX. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to six months net base salary at the rate in effect on the date of this Judgement, in addition to the compensation already paid to him;

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Brigitte **Stern**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1149

Administrative Tribunal

Distr. Limited
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1149

Case No. 1252: MENDOZA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Mr. Omer Yousif Bireedo;

Whereas at the request of Danila S. Mendoza, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 October 2001 and once thereafter until 30 April 2002;

Whereas, on 11 April 2002, the Applicant filed an Application, requesting the Tribunal, inter alia, to:

> "5. ... order the Respondent to pay her a special post allowance [(SPA)] for the period from 1 May 1996 through 31 December 1997, taking into account the first three months of her service as a higher level in accordance with staff rule 103.11. The Applicant also requests that the Tribunal order any other relief as it deems fit."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 August 2002 and twice thereafter until 18 January 2003;

Whereas the Respondent filed his Answer on 17 January 2003;

Whereas the Applicant filed Written Observations on 7 February 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization as a Clerk at the G-2 level with the Department of Economic and Social Affairs (ESA) on a three-month fixed-term appointment, on 5 January 1970. She was granted a permanent appointment on 1 January 1972. In 1981, the Applicant was successful in the examination for promotion to the Professional category. She was promoted to the P-1 level on 1 March 1982, and was transferred to the Department of Public Information (DPI). Following promotions to the P-2 level and P-3 levels as a Television Producer, the Applicant was temporarily placed against a P-4 level post for the period from 1 May 1997 through 31 July 1997. On 1 January 1998, she was promoted to the P-4 level. She retired on 31 May 1998.

On 23 January 1996, the Applicant's supervisor, advised the Executive Officer, DPI, that during the forthcoming six weeks absence of the Executive Producer of "United Nations in Action/CNN World Report" (UN in Action/CNN World Report), the Applicant would be his replacement. She pointed out that the Applicant had performed these functions extremely competently on several occasions in the past; that, unfortunately, the Staff Regulations and Rules precluded the granting of a special post allowance (SPA) to staff members serving in positions for less than three months; and that the "total accumulated time that the Applicant had taken on this responsibility" exceeded three months.

On 2 May 1996, the Officer-in-Charge (OiC), Media Division, DPI, informed the Executive Office, DPI, that the Applicant had been requested to perform, on a temporary basis, the functions of Executive Producer of UN in Action/CNN World Report, effective today, 2 May 1996, until further notice.

The P-4 post of Executive Producer, Video Section, became vacant upon the promotion of the incumbent, on 1 May 1997. On 18 May 1997, the Office of Human Resources Management (OHRM) approved the Applicant's temporary assignment to the post, from 1 May to 31 July. Effective 1 January 1998, the Applicant was promoted to the P-4 post. On 3 February 1998, she wrote to the Executive Officer,

DPI, asking him to consider granting her an SPA for the period from May 1996 onwards when she began to "discharge the duties of the P-4 post" until the date of her promotion.

In his reply of 6 March 1998, the Executive Officer, DPI, advised the Applicant that he was unable to approve her request for an SPA for the period from 1 May 1996 through 31 December 1997. He recalled that the OiC, Media Division, when asking her to perform higher level functions, had not recommended her for an SPA or asked her to be placed against a higher level post. Therefore, it had been decided that neither she nor her other colleagues who had been temporarily assigned to higher level functions would be recommended for an SPA. He added that when the issue came up again in May 1997, she was put against the higher level post, with OHRM's approval, on the understanding that the vacancy announcement was being circulated and that she was to be an applicant for the post, and that under the provisions of ST/AI/413 of 25 March 1996, and because of the limited nature of the assignment, no SPA would be granted.

On 3 April 1998, the Applicant wrote to the Secretary-General, requesting review of the decision to deny her an SPA.

On 11 June 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB issued its report on 18 December 2000. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
>
> ...
>
> 22. The Panel ... found that the Appellant had ... performed the work of Executive Producer without interruption from May 1996 to her retirement, the date of her promotion being the cut-off date for the purposes of this case. ... This finding is corroborated in ... the Appellant's promotion file:
>
> ...
>
> ... The Panel ... relied on the letter of assignment conferring to the Appellant the full duties and responsibilities of the post of Executive Producer as of 2 May 1996, and of the corroborating language in her promotion file to find that she had indeed fulfilled those functions at a stretch until 1 January 1998, when she was promoted.
>
> 23. ... [T]he Panel felt that the present situation was indeed 'exceptional' because the Appellant had been assigned higher level functions for extended periods of time prior to the contested period, had performed them uncomplainingly and well and was only now asking for recognition of her efforts.

24. As to the Respondent's argument that the Appellant could not have received an SPA because her supervisor had not recommended it, the Panel finds that [Personnel Directive] PD/1/84 [of 28 September 1990] clearly provides that a staff member can, on his or her own, initiate the SPA process by requesting an SPA ...

25. The Panel therefore found that the supervisor's recommendation was not an essential prerequisite for granting an SPA to the Appellant. It also found that the Department erred when it decided in March 1998 that the Appellant could not now be considered for an SPA for her work at the higher level because *inter alia* there had been no contemporaneous recommendation.

26. Next, the Panel turned to the question of whether the Appellant needed to have been placed against the higher-level post to be eligible for an SPA. The Panel found that ... [the] Personnel Directive makes no mention of the need for a staff member to be administratively placed against ... a [higher level] post in order to be eligible for an SPA. ...

27. The Panel therefore found that eligibility for an SPA did not require the staff member to be placed against the post. ...

28. Last, the Panel considered the discretionary authority of the Secretary-General. ... The Panel found the Appellant's Department and OHRM denied her an SPA because it mistakenly assumed

a) that the supervisor's recommendation (contemporaneous with the performance of higher-level functions) was a prerequisite; and

b) that the placement of the Appellant *against* a higher-level post was a prerequisite.

The fact that the Department 'never contemplated' an SPA for the Appellant, far from supporting the Respondent's reasoning, was found by the Panel to be aggravating the flawed nature of the decision-making process.

29. In sum, the Panel found that the decision by DPI and OHRM not to grant the Appellant an SPA for the period 1 May 1996 to 31 December 1997 was invalidated by the above named mistakes of fact and law [and] that this constituted a violation of her rights.

30. ... the Panel ... *unanimously recommends* that the Appellant be granted an SPA for the period 1 August 1996 to 31 December 1997. ..."

On 17 April 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General is not in agreement with the Board's position. Staff Rule 103.11 explicitly provides that the granting of an SPA is discretionary, rather than an entitlement as a matter of right, in stating that if the necessary conditions are present, a staff member 'may in exceptional cases', be granted an SPA. You have provided no evidence and the Board has made no finding of prejudice or violation of the Staff Rules by the refusal to grant the SPA in your case. In addition, contrary to the Board's view, the

> supervisor's recommendation (which should not be confused with the issue of whether it was the supervisor or the staff member initiating the request for an SPA) *is* an essential prerequisite for granting an SPA, as is made clear in paragraph 6 of PD/1/84/Rev.1, which provides that the granting of an SPA 'requires the approval of the [Assistant Secretary-General, for Human resources Management], *on the recommendation of the department or office concerned*' (emphasis added). In this case, no such recommendation was ever made. Likewise, it *is* an essential prerequisite that there must be a vacant post at a higher level (...). In this case, the post in question became vacant only on 1 May 1997, so there was no question of an SPA for the period prior to that date.
>
> In light of the above, the Secretary-General cannot accept the recommendation of the Board for the payment of an SPA ..."

On 11 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant served continuously for 19 months as Executive Producer from May 1996 to December 1997.

2. The granting of an SPA did not require that the Applicant be placed against a higher level post; it is sufficient that the Applicant was called upon to perform higher level functions.

3. In any event, when the Applicant requested an SPA, she had been placed against a higher level post.

4. The provisions of ST/AI/413 were not relevant to a consideration for the granting of an SPA. The discretionary decision not to grant an SPA was exercised in an arbitrary manner as relevant procedures were not followed and reasons external to the granting of a SPA were considered.

5. The Respondent erred in not upholding the unanimous recommendation of the JAB, namely that the Applicant be granted an SPA for the period 1 August 1996 to 31 December 1997.

Whereas the Respondent's principal contentions are:

1. The payment of an SPA is discretionary and is limited to "exceptional" cases.

2. The Applicant did not fulfill the mandatory criteria to be considered for payment of an SPA, as (1) there was no recommendation for payment of an SPA from the Applicant's Department, and (2) the Applicant was not assigned to the functions of a post for which budgetary conditions existed until 1 May 1997.

3. The decision not to grant the Applicant an SPA was made on the basis of staff rule 103.11 and PD/1/84/Rev.1 on SPA and not under the provisions of ST/AI/413.

The Tribunal, having deliberated from 28 October to 17 November 2003, now pronounces the following Judgement:

I. The procedures governing applications for and the granting of special post allowances relative to this case and the procedures for determining such applications together with the criteria to be considered thereon are dealt with by staff rule 103.11(a) and (b) and by PD/1/84/Rev.1.

Their provisions are as follows:

Staff Rule 103.11

"Special post allowance

(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.

(b) Without prejudice to the principle that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.

..."

PD/1/84/Rev 1

The most relevant portions thereof read as follows:

"3. Under Staff Rule 103.11 staff members are expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. The rule also affirms that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability. It provides nevertheless that a staff member who is called upon to assume the full duties

and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may be granted, in exceptional cases, a non-pensionable SPA from the beginning of the fourth month of service at the higher level. The SPA is therefore a payment designed to provide an additional financial compensation for the temporary but prolonged assumption by a staff member of the functions of a higher level post.

...

6. The granting of an SPA requires the approval of the Assistant Secretary-General for Human Resources Management, on the recommendation of the department or office concerned. Where a staff member believes that he or she fulfils all the conditions for the granting of an SPA, the request may be initiated by the staff member through the executive office or administrative office of the department concerned. The executive or administrative office shall provide the appropriate comments and forward the request with its recommendation to OHRM for consideration. ..."

II. The Respondent contends that on a proper construction of the provisions of the Personnel Directive and in particular article 6 thereof, the Assistant Secretary-General, OHRM, cannot embark upon a consideration as to whether he should grant or withhold his approval for the payment of an SPA unless there has been a positive or favourable recommendation "from the office or department concerned" meaning a recommendation in favour of payment. In effect, he contends for a restrictive construction of the words "on the recommendation of the office or department concerned". If this construction is to be given then it would follow:

(a) That the department or office would always enjoy an effective veto in relation to an application for the granting of an SPA as the functions of the Assistant Secretary-General, OHRM, to grant or withhold approval would be rendered nugatory and he would be deprived of his function in the matter if he could only consider an application where the recommendation had been favourable; and,

(b) That the department would effectively be bound to issue a favourable recommendation where '*the staff member considers that he or she fulfils all the conditions for the granting of SPA*' and the request is initiated by the staff member through the executive or administrative office of the department concerned, for in such cases the executive or administrative officer is required to provide the appropriate comments and forward the request **with its recommendation** to OHRM for consideration.

The Tribunal is satisfied that what was envisaged was a two tiered application process which would require in the first instance that the staff member's office or department would firstly indicate its views and recommendations as to whether the SPA claimed should be approved and that thereafter the Assistant Secretary-General, OHRM, would consider the application including the office or departmental recommendation whether it be favourable or unfavourable and then determine whether to grant or to withhold approval for payment.

It cannot be that the department or office concerned was to be given an effective veto so that by withholding a favourable recommendation it could frustrate the second part of the process nor would it make sense that in instances where the staff member initiated the request through the executive or administrative officer that it would then be incumbent upon the executive or administrative officer to forward his comments and a **favourable recommendation**, so as to comply with the requirements of article 6 and to trigger the consideration of the Assistant Secretary-General, OHRM, of the claim which would result in his decision as to whether to grant or to withhold his approval.

The Tribunal is therefore satisfied that the construction contended for by the Respondent cannot be correct and that when the Personnel Directive speaks of "the recommendation of the office or department concerned" that what was intended was such recommendation as it considered appropriate, be it a recommendation in favour of the granting or a recommendation that the application should be denied.

III. In the instant case, the Applicant's department declined to forward the application to the Assistant Secretary-General, OHRM, for his consideration as it considered that it was not admissible or not receivable by him for consideration in the absence of a favourable recommendation from the office or department concerned and on other grounds. Those other grounds included the issue as to whether the Applicant had ever fulfilled the functions at the higher level for a continuous period in excess of three months. The Applicant had claimed that she had been assigned to and had fulfilled the full functions at the higher level continuously between 2 May 1996 and 31 December 1997, whereas this was contested by the Respondent who claimed that she had only fulfilled the functions intermittently during the period and that no stretch when she had fulfilled them had exceeded the requisite minimum period of three months. In the circumstances, the Applicant never had her claim considered on its merits by the Assistant-Secretary-General, OHRM, as was her right under the Staff

Rule and Personnel Directive in the light of the Tribunal's decision as to their meaning, as stated above. The Tribunal is likewise concerned with the relevance of appropriateness in relation to the other grounds which were advanced by the Administration when it determined to dismiss the said application without further consideration, rather than to forward it to the Assistant Secretary-General, OHRM, for his decision but it is now unnecessary for the Tribunal to determine those issues or to express any view thereon, as it has determined that she was wrongfully denied her right to have her Application considered by the Assistant Secretary-General, OHRM, in accordance with the provisions of the Staff Rule and Personnel Directive concerned.

The Applicant has asked the Tribunal, should it find that she was denied proper consideration of her claim, that the Tribunal should itself embark on the consideration thereof and to rule that she was entitled to the SPA as claimed. The Tribunal is satisfied that it would be wholly inappropriate to embark upon such a consideration nor would it have any function in adjudicating upon the merits or otherwise of the claim. Accordingly, the Applicant's request in this regard is denied.

IV. It may well be that the Applicant would not have persuaded the Assistant Secretary-General, OHRM, to approve of the granting of the SPA as claimed. It appears to the Tribunal that some of the arguments made by the Respondent against the payment of such an allowance may have merit. The Tribunal expresses no views one way or the other. It just remarks that for example the Applicant may have had difficulty establishing that the services rendered by her during the period in question constitute "an exceptional case" as required by the Staff Rule and Personnel Directive, more particularly when it appears that similar duties had been performed by the Applicant on many prior occasions and she had never applied for let alone been paid any SPA for those said periods. Likewise, the issue as to whether the Applicant had fulfilled the full functions at the higher level for the entirety of the period from 1 May 1996 to 31 December 1997, as was maintained by the Applicant or just for intermittent periods none of which exceeded three months should have been considered by the Assistant Secretary-General, OHRM, in the course of an application for his approval. Certainly, the ground found by the JAB to establish "exceptional circumstances" namely "that she carried out the duties uncomplainingly" and maybe with a smile on her face may be somewhat novel and might not properly be considered

as establishing "an exceptional case" as envisaged by the Personnel Directive. Here again the Tribunal expresses no view on this aspect.

In any event it is not for the Tribunal to decide on the merits or otherwise of the Applicant's claim for the SPA. The case should have been properly considered by the office or department concerned in the first instance which should have determined the nature of the recommendation that it should issue and forward to the Assistant Secretary-General, OHRM, for his consideration under the second part of the process. The appropriate matters ought to have been properly considered by the Assistant Secretary-General, OHRM, who should have determined whether to grant or to withhold his approval.

V. In all of the circumstances the Tribunal limits its finding to one that the Respondent denied the Applicant a proper consideration of the said claim for SPA. It expresses no views as to its merits. By way of compensation to the Applicant for this wrong suffered by her the Tribunal awards to her the sum of $1000. The question now remains as to what should be done so that her claim will now be given proper consideration. The Tribunal orders that it now be dealt with afresh starting with the preparation of a proper report on her claim by her department which should include its recommendation, be it in favour of the payment or against it. This should then be considered by the Assistant Secretary-General, OHRM, in accordance with the prescribed procedure. It however recognises that either party may consider such a step as lacking in an air of reality and that the attendant further delays added to the delays which have already occurred may be considered by either party to be unacceptable. Should either the Applicant or the Respondent prefer in the alternative an order that the matter be resolved by the payment of further compensation rather than by now embarking upon a proper consideration which would have real difficulties at this late remove, the Tribunal awards to the Applicant an additional $500. This also constitutes a monetary payment in lieu of specific performance should the Respondent, in the interest of the Organization, determine to take no further action in the case.

VI. Accordingly, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of $1000 for the wrong suffered by her, in denying the Applicant a proper consideration of her claim;

2. Orders the Respondent to reconsider the Applicant's request for the granting of an SPA, in accordance with the relevant provisions of PD/1/84/Rev.1, unless either party opt that in lieu of such consideration the Respondent should pay a further sum of $500 to the Applicant; and,

3. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Omer Yousif **Bireedo**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1150

Administrative Tribunal

Distr. Limited
30 January 2004

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1150

Case No. 1259: SY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 29 May 2002, Fatima Sy, a former staff member of the United Nations, filed an Application, requesting the Tribunal, inter alia:

"9. ... to order:

(f) that the Applicant should be reinstated with full benefits and back pay in an appropriate P-4 post in the Secretariat in New York;

(g) that the Applicant should be given a permanent contract;

(h) that the Applicant should be appropriately compensated for violation of due process;

(i) or, failing reinstatement, that payment be made to the Applicant of a compensation of no less than two years net base salary."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 18 November 2002 and twice thereafter until 10 December 2002;

Whereas the Respondent filed his Answer on 26 November 2002;

Whereas the Applicant filed Written Observations on 17 February 2003, and, on 4 April 2003, the Respondent commented thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on a two-year fixed-term appointment, as an Associate Auditor, at the P-2, step one level, in the Internal Audit Division, Department for Administration and Management, on 28 September 1988. On 24 September 1990, she was reassigned within the Department as an Associate Administrative Officer to the Commercial, Purchase and Transportation Service. Effective 1 July 1992, she was promoted to P-3, and her functional title was changed to Administrative Officer. On 1 August 1994, she was transferred to the Department for Peacekeeping Operations (DPKO) where her functional title was changed to Finance Officer, and, on 1 October 1995, to the Executive Office, Department for Development Support and Management Services (DDSMS) where, effective, May 1996, she was promoted to P-4 and her functional title changed to Budget Officer.

Following the merger of DDSMS into the Department of Economic and Social Affairs (DESA), the Applicant was assigned as Procurement Officer to the Procurement Division, Office of Central Support Services (OCSS), effective 8 September 1998, and her fixed-term appointment was extended to 31 December 2000. The Applicant's appointment expired on 12 January 2001, but she was reappointed on 13 January as Budget Officer with the United Nations Organization Mission in the Democratic Republic of Congo (MONUC), Kinshasa, until 30 June 2001. Her appointment was extended several times, the last extension to expire on 31 December 2003.

Her performance was rated "excellent" throughout, and she was recommended several times between 1992 and 1995 for consideration for conversion to permanent appointment. On 29 March 1995, the Under-Secretary-General for Peace-Keeping Operations wrote to the Assistant Secretary-General for Human Resources Management, forwarding a memorandum from the Applicant, stating that he endorsed her claim, which he considered well-founded, and urging that her request for probationary appointment be favourably considered. On 10 April 1995, the Office of Human Resources Management (OHRM), replied that, as the Applicant did not meet the requirement of being employed on an established post, OHRM was not in a position to favourably consider the recommendation that she be granted a career appointment. On 19 June 1996, the Executive Officer, DDSMS, again strongly endorsed the case for granting the Applicant a permanent appointment. However, on 29 September 1996, OHRM reminded the Executive Officer of the continuing freeze

on conversion of staff on fixed-term appointments to career appointments, as announced in ST/SGB/280 dated 9 November 1995, assuring her that as soon as the freeze on conversion was lifted, OHRM would "make every effort to review [the Applicant's] case for conversion directly from fixed-term to permanent appointment as quickly as possible".

Effective 8 September 1998, following the absorption of DDSMS in the newly created Department for Economic and Social Affairs (DESA), the Applicant was redeployed to the Procurement Division. On 17 January 2000, the Assistant-Secretary-General, OCSS, was advised that the financing of the post to which the Applicant was assigned could only be assured through 31 December 2000. On 24 November 2000, the Department of Management, advised OHRM that efforts would be made to place the Applicant in the Programme Planning and Budget Division if they would be able to provide temporary funding for a further period of time in order to retain the Applicant as a staff member. Absent any other means of extending her contract, her appointment would not be extended beyond 31 December 2000.

On 13 December 2000, the Applicant was informed that efforts to find a suitable placement for her had not been successful and that, accordingly, her appointment would not be extended beyond 12 January 2001.

On 16 December 2000, the Applicant addressed a request for administrative review to the Secretary-General.

On the same day, she wrote to the Secretary, Joint Appeals Board (JAB), requesting suspension of action of the decision not to renew her appointment. On 21 December 2000, the JAB held a summary hearing. Although it did not recommend suspension of action, it did recommend that the appeal be dealt with on an expedited basis. This recommendation was endorsed by the Under-Secretary-General for Management on behalf of the Secretary-General and communicated to the Applicant in his memorandum of 29 December 2000.

The JAB submitted its report on the merits on 8 January 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
>
> 18. Having noted that Appellant had encountered a series of unfortunate circumstances in the course of her service ... the Panel nevertheless considered that her problems were primarily due to what can only be characterized as a lack of due diligence on the part of the Administration. Two separate aspects of this case were the basis for this conclusion.

19. The first of these was the question of consideration for career appointment. On several occasions, officials of OHRM implicitly or explicitly informed one or the other of the departments recommending her conversion that her case would be considered when that office got around to it. ... Nothing in Respondent's reply or Appellant's [Officinal Status] file reflects any action taken by OHRM to consider granting a career appointment to a candidate described by the Secretary-General (...) as a 'deserving young staff member'. After a review of Appellant's [performance evaluation reports] the Panel can only echo his evaluation.

20. ... the UNAT '[has] held . . . that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the administration to prove such consideration was given'. Respondent has failed to offer any such proof.

21. The second aspect concerned the efforts made by the Administration to find alternate placement for Appellant as from 1 January 2001. ... [N]early ten months elapsed between [the] warning that financing of Appellant's temporary post would end as of 31 December 2000 and any effort by OCSS to seek placement for her outside the Procurement Division ...

22. ... [T]he Panel considered that Appellant's more than twelve years of better than satisfactory service called for responsible action on the part of the Administration. The Panel concluded ... that 'Respondent has been negligent as an employer in failing to extend to the [Appellant] fair and proper treatment ...'

...

Recommendation

25. The Panel recommends to the Secretary-General that, as soon as possible, Appellant be given every reasonable – and the Panel would devoutly hope, favourable – consideration for a permanent appointment."

On 27 March 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General is not in agreement with the Board that there was inaction or negligence on the part of the Administration in respect of considering you for a permanent appointment, or in respect of finding alternate placement for you. It was indeed unfortunate that most recommendations for considering you for career appointment were made when the then applicable guidelines required the availability of a regular post for such consideration, and/or after the freeze on conversion of fixed-term appointments came into affect in November 1995. However, that fact that you did not have a career appointment was not the reason that you were in need of placement during the redeployment exercise, as is made clear by the fact that other staff with permanent appointments were put on the redeployment list. On the issue of finding alternate placement, the Secretary-General has been advised that, after it became clear that you could no longer be retained in the Procurement Division, numerous efforts were made to identify suitable posts for you elsewhere, which were regrettably unsuccessful. As regards the Board's recommendation, the Secretary-General cannot accept it as it is not

implementable: first, staff on 300 Series appointments cannot be considered for career appointment; second, since 1995, consideration for career appointment has been limited to staff on probationary appointments and those who were recruited through competitive examinations. However, your status gives you the right to apply to, and be considered for, any internal vacancies within the Secretariat as an internal candidate."

On 29 May 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's fixed-term contract constituted a de-facto disciplinary measure, in violation of her rights for due process.

2. The decision not to renew the Applicant's fixed-term contract was motivated by animus.

3. The Applicant's right for reasonable consideration for permanent appointment has not been respected.

4. The Applicant's right for fair consideration for renewal of fixed-term contract has not been respected.

5. The Applicant's non-renewal of fixed-term contract was part of a pattern of discrimination against black women in the Applicant's division.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right, nor the legal expectancy of continued employment with the Secretariat at Headquarters. No one has a right to serve in any specific post and in any particular duty station.

2. The Applicant had no right to conversion of contract. Her claims regarding conversion of contract are time-barred.

3. The contested decision and actions were not prompted by discrimination, improper motivations or extraneous factors. The Applicant's allegations of discrimination based on maternity leave, pregnancy related absence, race, and sex, are without foundation.

4. The decision not to renew the Applicant's contract with OCSS at Headquarters did not constitute a disguised disciplinary action.

The Tribunal, having deliberated from 29 October to 17 November 2003, now pronounces the following Judgement:

I. This case revolves around two issues. The first issue refers to whether or not the Administration was wrong by not giving the Applicant "every reasonable consideration" for a permanent post in response to the Applicant's request, supported by her superiors, to be considered for a probationary appointment and then directly for a permanent post. The second, whether the Administration was sufficiently diligent in attempting to place her in a post equivalent to the one she held when she was subject to redeployment because DDSMS, where she worked, was merged with DESA in 1998 and a number of posts were consequently abolished.

II. With regard to the first issue, it is obvious that in normal conditions the Applicant would have been entitled to be considered in good faith for a permanent post, since she had very favourable recommendations. Obviously, she was only entitled to consideration, however, since the granting of this type of post is at the discretion of the Administration, provided there is no discrimination, arbitrariness or another improper motivation. The *onus* probandi, of course, falls on the Applicant.

III. The Tribunal notes that as early as August 1992, the Chief, Commercial, Purchase and Transportation Service, noting the Applicant's "outstanding" performance, had recommended that her contract be converted to probationary. This recommendation was not followed up because, at the time, the Applicant had not yet served for five years with the Organization. Subsequent recommendations to grant her a probationary appointment, in October 1994 and in March 1995, were rejected on the grounds that she could not be considered a "pipeline" case (the usual probationary period be waived and she be converted directly from fixed-term to permanent), as she was recommended after 12 March 1992, and on the grounds that she did not meet the condition of availability of a regular post, respectively. Thus, while the Tribunal is sympathetic to the Applicant's plight, it is satisfied that the Applicant's appointment was not converted for technical reasons, and not due to a lack of action on the part of the Administration.

IV. The Tribunal is satisfied, moreover, that the holding of a permanent post would not necessarily have saved her from the vicissitudes that resulted from her inclusion in the redeployment exercise, as the Respondent observes, since staff members with permanent posts were included in the redeployment as well.

V. As for the Administration's alleged negligence in providing her with a post that was equivalent to the one she held, the important fact is that the Applicant continued in the service of the Organization, on a fixed-term appointment, except that her new post was in Kinshasa instead of at Headquarters, which she preferred. But staff members must be open to being placed at other duty stations, since the Secretary-General is authorized to assign them wherever they are needed, under staff regulation 1.2 (c): "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations".

VI. The Applicant claims, however, that the Administration had not renewed her contract in January 2002, and that she was actually the one who obtained the post in the Democratic Republic of Congo through her own efforts. Moreover, there was no continuity between the previous post and her current contract with the United Nations, valid until December 2003. In support of this claim, she points out that the former was at the P-4, step 6 level, and the latter is at step 1, and that the former post had international benefits, while the latter does not.

VII. With respect to her first argument, it must be said that, whether or not she obtained her current post through her own efforts, the post is a United Nations post, no matter how she obtained it, and therefore it was ultimately granted to her by the Administration. The United Nations is a single entity, and even assuming that there was some negligence or lack of good faith by some part of the Administration, in granting the Applicant a new post, other parts of the Administration corrected the situation, and therefore it can be said that it was the Administration itself which made amends. A new contract was granted when the earlier one expired, and it was the Administration which ultimately granted it to her.

VIII. The second issue raised by the Applicant is that there was no continuity between the two posts. However, no rule exists which requires the Administration when granting a new fixed-term contract to ensure that it has the same characteristics as that of the earlier contract, particularly where a state of necessity exists which obliges the Administration to propose, and the Applicant to accept, a less attractive post than the former one. The Tribunal does not consider that negligence or bad faith on the part of the Administration has been proved, and moreover the record bears witness to the efforts made by OHRM to place her in the Internal Auditing Division of the Office of Internal Oversight Services, the United Nations Office for Project

Services and the Department of Peacekeeping Operations; the contacts maintained by OHRM with the executive offices of all departments and offices at United Nations Headquarters; and, the efforts made in coordination with the Office of the Special Adviser on Gender Issues and Advancement of Women. In addition, from September to December 2000, the Applicant applied for a number of posts, according to the Executive Officer, Department for Administration and Management: a P-4 post as Administrative Officer in the Office of the Assistant Secretary-General, OCSS, in September 2000; as Finance Officer in the Commercial Activities Service, OCSS, in October 2000; a P-5 post in the Procurement Division, in November 2000; and another at the same level in the Office of Programme Planning, Budget and Accounts, in December 2000. She was called in for an interview for at least one of these posts.

In the Procurement Office there were, during the time in which the Applicant was redeployed, two vacant P-4 posts. The one that the Applicant claims should have "routinely" been granted to her was available on 16 February 2001. The Assistant Secretary-General, OCSS, had concluded, however, based on the operational needs of Procurement and the Security and Safety service, that a swap of a P-4 post from Procurement in exchange for a P-3 from Security was necessary, which was implemented in due time. The other P-4 post which was available at the end of April 2002, required specialized knowledge regarding the shipping aspects of procurement (ship chartering or freight forwarding) that exceeded the normal functions of a generic procurement officer. In any case, the Applicant did not apply for it in spite of having being advertised on May, 2001.

IX. It must be born in mind that the priority enjoyed by staff-members in the position of the Applicant is only relative, and must give way whenever considerations regarding the best qualified applicant for a vacant post enter into play. The Tribunal recalls its jurisprudence in Judgement No. 971, *Stepanenko* (2000), para. V:

> "With regard to the meaning to be attributed to the phrase 'be given priority consideration', the Tribunal emphasizes that its decision cannot be interpreted as running counter to the principle that staff members in the same situation must be treated equally, a principle which governs the management of the international civil service. It follows that in using that phrase, the Tribunal did not intend to order the automatic reinstatement and promotion of the Applicant in whose favour the judgement was rendered. According to the Applicant's line of reasoning, the Tribunal would substitute its judgement for that of the Administration in matters of promotion and appointment, fields in which the Respondent possesses wide discretion. Furthermore, the concern to provide the Organization with staff meeting the highest standards of efficiency,

competency and integrity in accordance with Article 101 of the Charter, which has often been reflected in the decisions of the Tribunal (Judgement No. 385, *Sobel* (1987)), prevents this phrase from being interpreted too restrictively. Consequently, the Tribunal interprets the phrase 'be given priority consideration' as follows: When considering candidacies for the vacant post for which the Applicant is qualified, the Administration must give priority consideration to the candidacy of the Applicant, but that does not preclude consideration of other candidates for the same post. However, if the Applicant has the same qualifications as another candidate, preference shall be given to the Applicant."

X Finally, the Tribunal must examine the Applicant's claim that discrimination and animosity was used against her. The Tribunal notes that this accusation involved only one Director, and that it has not been proven. While various offices and departments were involved in the Applicant's situation, none of these appeared guilty of animosity or discrimination. The Applicant cannot support her allegation of animosity by referring to her "interpersonal difficulties", as the Applicant herself was aware of these difficulties and even made a "concerted effort to address those problems through personal development courses", according to notes made by the Special Adviser on Gender Issues and Advancement of Women and by the Executive Officer, Department of Management.

XI. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1151

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1151

Case No. 1260: GALINDO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr Mayer Gabay, Vice-President, presiding; Ms. Brigitte Stern; Ms. Jacqueline R. Scott;

Whereas, on 6 June 2002, Angelino Galindo, a staff member of the United Nations filed an Application, requesting the Tribunal, inter alia:

"2.1 To order the rescission of the decision of the Secretary-General dated 6 March 2002 to demote the Applicant to the P-3 level with no possibility of promotion and reassignment to an environment where he shall no longer exercise decision-making and managerial responsibilities;

2.2 To order the Respondent to place the Applicant on a P-4 post at the earliest opportunity. Until such post has been identified, the Applicant to be paid his salary and benefits at the appropriate P-4 level;

2.3 To order the Respondent to restore the Applicant to the position he would have been in had he not been demoted, by retroactively paying him the difference in salary and related allowances between his P-3 and P-4 levels, with the appropriate within-grade increments, from 15 March 2002 to the date of its Judgement;

2.4 To order that the Applicant's right to be considered for promotion and for posts where he can exercise decision-making and managerial responsibilities be restored;

2.5 To fix the amount of compensation to be paid to the Applicant for the injury sustained in the event that the Secretary-General, within 30 days of the notification of its Judgement, decides in the interest of the United Nations that the Applicant shall be compensated without further action being taken in his case;

2.6 To award the Applicant adequate and equitable compensation for the harm he sustained and the moral injury resulting from the consequences of the failure to afford him due process."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 December 2002 and thereafter until 14 January 2003;

Whereas the Respondent filed his Answer on 14 January 2003.

Whereas the Applicant filed Written Observations on 27 February 2003.

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 June 1976, as a Field Service Officer for the United Nations Interim Force in Lebanon (UNIFIL), at the FS-3 level, under a one-year fixed-term appointment, extended on a yearly basis until 1980. At the time of the events which gave rise to this Application, the Applicant was Chief, Personnel Unit, United Nations Conference on Trade and Development (UNCTAD).

On 10 April 2001, the Head of Office, United Nations Liaison Office (UNLO), Zagreb, requested the guidance of the Chief Administrative Officer, United Nations Mission in Bosnia and Herzegovina (UNMIBH/Sarajevo), concerning an "alleged theft involving a UN staff member from Geneva".

A preliminary investigation ensued, based upon an incident report, dated 10 April 2001, from a United Nations Security Section investigator. The report was compiled from information supplied by a PX Detective of the NATO Stabilization Force (SFOR) PX store in Zagreb, Security Officers of the International Military Police, as well as on statements made by the Applicant himself. The report in question provided in part as follows:

"On 9 April 2001, the staff member was observed on CCTV cameras, at the SFOR PX store in Zagreb, taking a toothpaste off the shelf, walking to an isolated area of the store, removing the toothpaste from the packet, putting the tube of toothpaste in his pocket, returning the empty toothpaste packet to the shelf, and then going to the cash register, where his wife paid for other items. He left the store without paying for the toothpaste that he had concealed in his pocket. As he left the PX store, he was approached by the PX Detective and asked to accompany her to the PX Security Office.

> The PX Detective and the SFOR Military Police questioned the staff member, and he admitted, orally and in writing, that he removed the tube of toothpaste from the PX store without paying for it ..."

On 17 April 2001, the Chief Administrative Officer, UNMIBH/Sarajevo, informed the Chief, Human Resources Management, UNOG, of the alleged involvement of the Applicant in the theft, and on 24 April 2001, a copy of the preliminary investigation report was sent to the Assistant Secretary-General for Human Resources Management.

On 30 April 2001, the Director, Specialist Services Division, OHRM, informed the Applicant of the allegations against him, and forwarded him a copy of the incident report, along with related documentation, as well as a copy of the 24 April memorandum. The Applicant was requested to submit his comments.

On 9 July 2001, the Assistant Secretary-General for Human Resources Management referred the case to the Joint Disciplinary Committee (JDC), Geneva, requesting the JDC to advise the Secretary-General as to possible disciplinary measures. The Applicant was notified on July 24 of the referral of his case to the JDC.

The JDC submitted its report on 14 January 2002. Its considerations, conclusoins and recommendations read, in part, as follows:

> "**Consideration of the charges and findings**
>
> 50. The Panel firstly examined the charges of theft made again the staff member. The Panel recalled that the staff member admitted having stolen a tube of toothpaste from the PX Store in Zagreb on 9 April 2001 but declared that 'he is not aware of having been involved in an act of theft' on 10 March 2001. Having read the investigation reports including the various contradictory statements of the staff member, and viewed the videotape of the PX Store, the Panel was of the opinion that the staff member was clearly involved in the former incident, and most likely also in the latter.
>
> 51. The Panel was of the opinion that the act of theft is reprehensible in itself and that the fact that the staff member had stolen once or twice was not so important. In the same spirit the Panel considered that the value of the stolen item was a subsidiary element repeating that what really matters is the theft *per se* and the prejudice caused to the Organization. The Panel indeed unanimously considered that the misconduct of which the staff member is accused tarnished and undermined the image of the United Nations and therefore constitutes an unquestionable prejudice to the Organization.

52. In addition, the Panel noted, in the course of the examination of the facts, that the staff member obtained a Ration Card from the PX Store upon presentation of his UN Laissez-Passer, while he was not performing official functions but was on a private trip. To hold such a Card he should have possessed an official UN Mission ID Card. The Panel also noted that the SFOR Ration Card he used had been issued in March 2000 and was expired.

...

54. The Panel discussed at length the argument of stress put forward by the staff member. Before taking any position on the matter, the Panel made it clear that if stress and emotional problems were to be recognized, these arguments would not exonerate the staff member from his responsibilities but could only constitute mitigating factors.

...

61. Consequently, all these related facts and the overall attitude of the staff member led the Panel to believe that the staff member knew quite well what he was doing, and that his responsibility could be fully engaged. Moreover, the Panel felt that concerning a number of issues, even minor ones, the staff member was deliberately misrepresenting facts.

62. Finally, given all these elements which are not strictly linked with the theft but which are telling about the overall attitude of the staff member, the Panel found that there was a lack of honesty and integrity of the staff member, aggravated by the staff member's official position as Chief of Personnel of UNCTAD.

Conclusions and recommendations

63. The Panel **concludes** that the staff member has failed to comply with his obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules, in particular its Regulation 1.2 concerning *basic rights and obligations of staff* and to observe the standards of conduct expected of an international civil servant.

64. The Panel **considers** that the following elements constituting misconduct are reunited in the present case:

a) There is evidence that the staff member committed unlawful acts (i.e. theft) in the sense of Paragraph 2 (b) of ST/AI/371;

b) There is evidence that the staff member abused the United Nations privileges and immunities in the sense of Paragraph 2 (f) of ST/AI/371 in using his UN Laissez-passer for private purposes;

c) There is evidence that the committed acts discredited the United Nations in the sense of Paragraph 2 (g) of ST/AI/371.

65. In view of the response of the staff member to the allegations made against him, the Panel **considers** that the explanation provided, i.e. a reaction to stress, does not waiver the staff member's liability and should therefore not be considered as a mitigating factor.

66. Therefore, the Panel **considers** that there is a blatant lack of integrity and that the staff member's position as Chief of Personnel of UNCTAD constitutes an aggravating factor.

67. In view of the above, the Panel **concludes** that the staff member has engaged in unsatisfactory conduct for which disciplinary measure may be imposed.

68. Therefore, the Panel **recommends** to the Secretary-General that the staff member be separated from service with compensation in lieu of notice on the grounds of serious misconduct incompatible with the basic requirements to be met by a United Nations staff member.

On 6 March 2002, the Under Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

> "The Secretary-General has given careful consideration to the findings of the Committee and has concluded that the charges that you committed theft and discredited the United Nations are well founded and that your conduct constituted a serious violation of the standards of conduct and integrity expected of each staff member of the Organization, aggravated by your official position as Chief of Personnel of UNCTAD. He has also considered the proportionality of the recommended disciplinary measure of separation from service to the misconduct of shoplifting a tube of toothpaste. Out of clemency and pursuant to his discretionary authority to impose appropriate disciplinary measures, the Secretary-General has decided that you be, instead, demoted to the P-3 level pursuant to Staff Rule 110.3(a) (vi), with effect from close of business on the day you receive this letter. Due to the nature and seriousness of your misconduct, your demotion will be with no possibility of promotion and would entail a reassignment to an environment where you shall no longer exercise decision-making and managerial responsibilities. ..."

On 6 June 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The report of the JDC does not provide a basis on which the Secretary-General could have reasonably placed reliance.

2. The facts on which the disciplinary measures were based have not been established.

3. The established facts do not legally amount to misconduct and are disproportionate and unfair.

4. The conclusions of the JDC are flawed, inconsistent and fall short of required standards of professionalism, fairness, and objectivity

5. The decision of the Secretary-General violates established policies of the UN as set forth in ST/IC/1999/111 with regard to the mental health of staff and is discriminatory and arbitrary.

6. The sanction is illegal since neither the ban on future promotions and exclusion from decision-making and managerial responsibilities are not among the disciplinary measures set forth in Staff Rule 110.3 and cannot be imposed without appropriate amendment.

Whereas the Respondent's principal contentions are:

1. The Secretary-General and the Executive Director of UNCTAD have broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting summary dismissal. The decision to demote the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

2. The Applicant was accorded due process.

3. The decision to, inter alia, demote the Applicant was not illegal or disproportionate.

4. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

The Tribunal, having deliberated from 30 October to 17 November 2003, now pronounces the following Judgement:

I. The Applicant is appealing the Respondent's decision to demote him to a P-3 level without possibility of promotion, for allegedly engaging in unlawful conduct and for abusing his privileges and obligations as a United Nations staff member. The Applicant claims that the Respondent's decision and the resulting sanctions imposed upon him were illegal, disproportionate to the offense, procedurally flawed, and in violation of his due process rights.

II. In June 1976, the Applicant joined the United Nations, as a Field Service Officer for UNIFIL, at the FS-3 level pursuant to a one year fixed-term appointment. In February 1981, the Applicant successfully passed the competitive examination for promotion to

the Professional category and in April 1982, was transferred to UNOG. In March 1985, the Applicant was granted a permanent appointment, and shortly thereafter, transferred to the Purchase, Transportation and Internal Services, as Chief of the Accounts and Inventories Unit.

From October 1992 until June 1997, the Applicant served as Officer-In-Charge of Personnel for UNCTAD. In 1998, he was promoted to P-4 level and made Chief of Personnel.

On 10 April 2001, the Head of Office, UNLO, Zagreb, notified the Chief Administrative Officer, UNMIBH/Sarajevo, of an alleged theft committed by the Applicant, described in a report of the same date from a United Nations Security Section investigator, which stated, inter alia, that:

> "on 9 April 2001, the staff member was observed on CCTV cameras, at the SFOR PX store in Zagreb, taking a tube of toothpaste off the shelf, walking to an isolated area of the store, removing the toothpaste from the packet, pocketing the toothpaste, returning the empty packet to the shelf, and then going to the cash register, where his wife paid for other items. He left the store without paying for the toothpaste concealed in his pocket. As he left the PX store, he was approached by the PX Detective and asked to accompany her to the PX Security Office.
>
> The PX Detective and the SFOR Military Police questioned the staff member, who admitted, orally and in writing, that he removed the tube of toothpaste from the PX store without paying for it.
>
> According to the written statement of the PX Detective, the staff member admitted to her that he had in fact stolen two tubes of toothpaste, one on 10 March and one on 9 April 2001.
>
> The Applicant denied being in Zagreb on 10 March 2001. Despite this statement, the PX CCTV tapes of 10 March 2001 confirmed that the staff member was present in the PX store on that date."

The case was referred to the JDC which, on 14 January 2002, unanimously concluded that the Applicant had failed to comply with his obligations under the Charter of the United Nations and the Staff Regulations and Rules. Finding sufficient evidence to support the charges, the JDC recommended that he be separated from service. On 6 March 2002, the Under-Secretary-General for Management informed the Applicant that out of clemency and in lieu of the proportionality of the recommended disciplinary measure of separation from service to the misconduct of shoplifting a tube of toothpaste, he would be demoted instead to a P-3 level with no possibility of promotion, and prohibited from employment in any position requiring decision-making or managerial responsibilities. On 6 June 2002, the Applicant appealed to the Tribunal.

III. The Respondent reminds the Tribunal that the Secretary-General is vested with broad discretion in relation to disciplinary matters, including determination of what actions constitute serious misconduct warranting summary dismissal. Thus, according to the Respondent, the decision to demote the Applicant constituted a valid exercise of those discretionary powers and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

While the choice of disciplinary measure to be imposed pursuant to Staff Regulation 10.2 falls within the Secretary-General's discretionary powers (see Judgment No. 941, *Kiwanuka* (1999)), the Tribunal is cognizant of the fact that, in the case of UNCTAD, this authority had been delegated to the Executive Director of UNCTAD.

IV. The explanation offered by the Applicant for his actions, was that he experienced a lapse in judgement as a result of mental problems attributable to cumulative stress and exhaustion. The Tribunal finds it difficult to believe that a long term seasoned employee holding a responsible and reasonably high level position would consciously endanger or destroy his career by engaging in so petty a crime as to steal an inexpensive tube of toothpaste, while at the same time paying for all the other more costly items in his shopping basket. The nature of the offense for which the Applicant had been punished, under these circumstances, would normally warrant little more than an admonition, a slap on the wrist or a referral for psychiatric assistance but certainly would call for the imposition of a much lighter penalty. It is therefore reasonable for the Tribunal to assume that the Applicant's bizarre behavior was engendered by some temporary mental lapse or aberration to which the Respondent overreacted by imposing an excessive and disproportionate penalty.

V. The Tribunal concurs with the Applicant's contention that the Respondent's discretionary authority must function within the requirements of due process. In this connection, the Applicant alleges that his due process rights were violated during the JDC proceedings, specifically when he was not allowed to rebut or comment on information requested and utilized by the JDC in its proceedings.

The Respondent however, claims that the Applicant was notified of the charges against him, provided reasonable opportunity to respond to those allegations, both in writing and orally before the JDC, informed of his rights to seek legal assistance and that there was no intent on behalf of the JDC to conceal any information from the

Applicant, specifically, the information from the Applicant's supervisor and the Joint Medical Service at UNOG. Although the Tribunal assiduously guards the Secretary-General's power to discipline staff, it has held consistently that the exercise of that power is not without limitation. Consequently, in disciplinary cases, the Tribunal may examine: (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g., omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (See Judgments No. 898, *Uggla* (1998), para. II; and, *Kiwanuka, ibid.*, para. III).)

VI. The Tribunal requires the Applicant to shoulder the burden of proving prejudice or other improper motives (see Judgments No. 834, *Kumar* (1997); and, No. 1122, *Lopes Braga* (2003)). The Applicant claims that the JDC violated his due process rights by failing to permit him the right to rebut and comment on information received by the JDC and which he specifically requested. The Tribunal agrees, and finds that the Applicant has met the requisite burden of proving that his due process rights were violated.

VII. In conclusion, the Tribunal finds that the Applicant's due process rights were violated when the JDC refused to afford the Applicant with the opportunity to respond to the information he requested and believes that the action taken against the Applicant was excessive under the circumstances and warrants reduction.

VIIII. For the foregoing reasons, the Tribunal:

1. Finds the penalty of demotion with no possibility of promotion and prohibition from employment in any position requiring decision-making or managerial responsibilities disproportionate to the offense;
2. Orders that the Applicant be granted priority consideration for any position at the level for which he applies and for which he is qualified;
3. Orders that the Applicant be given as compensation, on a monthly basis, an amount equivalent to the difference in remuneration he receives at his present grade and the remuneration he would have

received at the level he held prior to his demotion, starting on the date of the circulation of this judgement until such time as he is promoted;

4. Rejects all other pleas.

(*Signatures*)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary